# TRIAL BY JURY IN ATHENS AND AMERICA

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No modern admirer of Athenian civilization has allowed his enthusiasm to blind him entirely to the defects inherent in the Athenian administration of justice. Unbiased treatises[1] on this subject invariably call attention to the weaknesses in the system, and even contemporary critics, such as Plato, Aristophanes, and Xenophon,[2] deal with the matter almost as mercilessly as modern writers. Consciously or not, we have come to feel a certain pride in our superiority over the Athenians in our administration of justice. In this we are unquestionably right and it is in no sense my desire to contend the opposite. It will, however, be illuminating to review some of the criticisms on our own jury system that are appearing in print from time to time, and to note how similar they are to those passed on the Athenian.

The defects in the Athenian system are directly traceable to the character of the popular courts.[3] Given a jury of several hundred men, who feel themselves committees of a sovereign assembly; who are impaneled without examination as to attitude toward the litigants or the question at issue; who are not later subject to trial for their behavior or their decisions and are consequently irresponsible; who have no presiding judge whose duty it is to decide what is relevant or to instruct them as to the law according to which they should vote—given such a jury, the surprising thing is not that sometimes justice was hard to secure, but that it was apparently the rule rather than the exception.

At first thought there seems to be so little in common between such a body and our "buttress of liberty" that what is said in praise or criticism of one would in no way apply to the other. Let us see if this is the case.

[1] E.g., Wyse in Whibley's *Companion to Greek Studies* (3d ed.), p. 476; Gilbert, *Greek Constitutional Antiquities* (Eng. ed.), p. 415.

[2] Xen. *Apology* 4; Plato *Laws* 767 C–E, 876 AB, *Gorgias* 515 E; Isocrates *Antidosis* 142; Aristophanes *Wasps, passim.* For fuller account, with references, see the author's *Sycophancy in Athens*, pp. 15–17.

[3] *Sycophancy in Athens*, pp. 10 ff.

Criticism of the American system is chiefly devoted to the question of jury trial in civil cases,[1] a custom which some writers consider inadvised and impractical and others even unethical. I shall, in this paper, review only those criticisms of the American juries which offer obvious Athenian parallels.[2]

Writers are generally agreed on the subject of the personnel of the American jury. Due to a number of reasons, the average jury, they feel, is composed of individuals of mediocre ability and mentality, who regard it as no great inconvenience to devote their time to such service.[3] Statistics seem to show that busy professional men and successful business men prefer to pay the fines imposed for refusal to serve rather than devote their time to jury duty.[4] It is entirely probable that men engaged in professions which carry with them exemption from jury service, such as teaching, for example, avail themselves of this exemption not entirely because they are so devoted to their business, but because they as conservative and law-abiding citizens are entirely satisfied with a vicarious acquaintance with the courts. The consequence is that jury service has grown to be practically a profession with a type of otherwise unemployed or at least indifferently employed individuals.[5]

That jury service in Athens was regarded as a profession of the litigiously inclined is hardly a debatable question. Such an extravaganza as the *Wasps* is not our only source for such a conclusion. More sober statements of the same nature may be found in the orators and in Plato and Aristotle.[6] The reason for this is not hard to find. The wealthy, non-litigious, conservative, aristocratically inclined Athenians avoided jury service so far as they could, just as they avoided litigation. The innumerable

[1] Some writers are also opposed to jury trials in criminal cases; see Greer in *American Law Review*, XLII, 195 ff.

[2] My summary of what is said against trial by jury in America is naturally rather sketchy. The writers quoted are: W. L. Scott, *American Law Review*, XX, 661 ff.; H. W. Greer, *ibid.*, XLII, 192 ff.; Percy Werner, *Ohio Law Bulletin*, LXIV, 351 f., and *Public*, XXII, 957 ff.; Ralph Bergengren, Samuel Stern, and Lawrence Irwell in a group of three articles in *Unpartizan Review*, XIII, 26, pp. 273 ff.

[3] *Unpart. Rev.*, XIII, 26, pp. 274, 289, 304, 307; *Am. Law Rev.*, XX, 668.

[4] *Unpart. Rev.*, XIII, 26, pp. 288 f.

[5] *Ibid.*, pp. 289, 300, 304.

[6] For references, see *Syc. in Ath.*, p. 9 and notes.

cases, due to the litigation-loving populace and the development of the Athenian empire demanded jurors and someone must serve. The poorer element, then as now, was not averse to serving and the pay that was introduced by Pericles and later increased, probably by Cleon, made it possible for them to devote their time to this.[1] The popularity of the service was undoubtedly also due, to some extent at least, to the sense of importance that the power of the ψῆφος gave the jurors and to the flattering respect paid them by the litigants.[2] Philocleon's eulogy on the jurors' "happy life," exaggerated though it be, gives us some idea of the extent to which litigants would go to curry favor,[3] and the speeches of the orators are far from free of the same tendency.[4] American jurors are also accused, by one writer at least, of letting themselves become filled with exaggerated self-importance due, in part, to the sycophantic flattery and adulation shown them by shrewd attorneys who think they know their men.[5]

Criticisms of people who depend on their fees as jurors for their livelihood are naturally bitter. Aristophanes' sallies against the Demus that tries a case or two and gets its three-obol[6] are no more caustic than Isocrates' less sparkling description of those who "draw lots for their daily bread outside of the law courts, and live on their fees as jurors."[7] The language used in describing the situation in America differs but little. "The inconvenience [of jury service] itself varies. It is real to some of us, and, to put it gently, not unlike a blessing in disguise to others. . . . . The citizen to whom $3.00 a day is a good wage is naturally more philosophical."[8] Some of our American jurors have been known to hold out (in voting) until midnight for no other reason, as they later explained, than because they understood that if a verdict was not reached until after midnight, the jurors were entitled to an

[1] Plato *Gorgias* 515 E; Aristophanes *Knights* 51; Aristotle *Const. of Athens* 27.3.
[2] See *Syc. in Ath.*, pp. 9 with notes, 14.
[3] Aristophanes *Wasps* 559–67, 578–82, 620–25.
[4] See *Syc. in Ath.*, p. 14 with notes for references.
[5] *Am. Law Rev.*, XLII, 195. This is said of state courts in particular.
[6] *Knights* 51.
[7] Isocrates vii. 54; viii. 130.
[8] *Unpart. Rev.*, XIII, 26, p. 274.

additional day's pay.[1] The scathing jests of Aristophanes will cease to be open to the charge of exaggeration if we read him in the light of such remarks. One writer recalls the instance of the woman juror who was guilty of favoring postponement of the verdict until "after the dinner hour so that the jurors might have another meal at the expense of the county."[2] And the county allowed 40 cents for the dinner! Small reason for laughing at the Athenian's joy in his three-obol. Nor may we assume that this lady's suggestion was unique. The same writer tells us that "every person who has ever served upon a jury, understands that there are always men upon the panel who hold out until after they can secure a meal or two at public expense."[3] If as a nation we are so inclined, it is but natural that the "professional juror is much in evidence."[4] Jurors who are anxious to prolong their service in the interests of a 40-cent dinner are not always the most desirable. It seems undeniable that the compensation paid to jurors is adequate only to men of very moderate capacity, and it is consequently difficult to secure jurors really able to reach proper conclusions,[5] since often the best men attempt to evade the duty (especially in the larger cities) and so leave on the panel "an undue projection of men of limited business experience, often of meager intelligence, who are totally unfit for the service."[6] In similar, but more impersonal, fashion, Aristotle comments on the personnel of the jury in Athens after it had grown "democratic" under Pericles: "As a result of this pay for jury service, some critics charge that they became inferior in as much as the men of the street were much more anxious to be drawn for jury service than the better element."[7] By "some critics" he probably refers to Plato who in the *Gorgias* comments on the "corrupting" of the Athenians due to the pay for jury service, and other state duties, by which they became "idle and cowardly and fond of talk and

[1] *Unpart. Rev.*, XIII, 26, pp. 298 f.
[2] *Ibid.*, p. 299.
[3] *Ibid.*, p. 299.
[4] *Ibid.*, p. 300.
[5] *Ibid.*, p. 307.
[6] *Ibid.*, p. 289.
[7] *Const. of Athens*, 27. 4.

money.'"[1] It will be observed that these criticisms of the Athenian and American juries start from different points of view. Athenian writers regret the fact that pay for service was introduced because it made it possible for the poor and idle and unambitious to sit as jurors. American critics feel that not enough pay is given to make it possible to get the ablest type of man on the jury. In both cases, however, the attitude toward the resultant nature of the juries is the same.

This eagerness of the otherwise unemployed Athenian to sit on the jury and the reluctance of the better element to have anything to do with the courts, naturally resulted in prejudiced jurors. It was difficult for such a body to regard a wealthy conservative's case without bias. Instances of unfair decision were doubtless much less numerous than the impressions created by the critics might at first lead us to believe and Isocrates was probably more epigrammatic than exact when he declared that wealth rather than crime made a man's life precarious.[2] But at any rate there must have been a real reason for the frequent efforts on the part of speakers to represent themselves as poor and their opponents as wealthy.[3] On one occasion, the defendant, a man who was supposed to have come in for some property, frankly admits that he is at a disadvantage because money is "tight" and the state in need of funds.[4] In America, corporations, as well as wealthy individuals, suffer from the prejudice of jurors. We are all more or less familiar with the general attitude toward railroads, for instance, and so are not at all surprised to read the statement that in one case at least the jurors chose to disregard the evidence and to vote against a railway company, "because it could afford to pay" the person who had brought action.[5] On another occasion, a jury sitting on a condemnation case to decide the value of a piece of property wanted by the Great Northern Railway as right of way, listened to the values fixed by several witnesses who had been summoned and finally voted for a figure ten times the actual value of the

[1] 515 E.

[2] *Antidosis* 100.

[3] For references see *Syc. in Athens*, p. 15.

[4] Lysias 19. 11.

[5] *Unpart. Rev.*, XIII, 26, p. 292.

property, although the witness who had placed that value frankly admitted, on cross examination, that his basis for fixing that value was "Jim Hill wants it."[1] Jim Hill might very well have quoted Isocrates and said: "Before a jury one must apologize for financial success."[2]

Wealth is not the only thing that stirs our jurors' prejudices. Racial antipathies figure strongly. This is evidenced by the fact that it is not unusual to question jurors when a foreigner is a litigant as to whether they have any prejudices against foreigners in general or against the particular nationality represented by either of the parties in litigation.[3] One writer relates an incident that shows how strong these racial prejudices are. A member of the jury persisted in casting his vote against the defendant, a Greek, not because of the evidence against him, but because, as he said, "he had no use for Greeks; they were all dishonest and he had never employed one that he could trust"[4]—and this in spite of his oath to give defendant a fair trial. If such is the case in twentieth-century America there is small cause for wonder if non-Athenians found difficulty in getting fair treatment at law at Athens. Xenophon and the orators, as well as Aristophanes, contain some indication that the Athenian allies were at a disadvantage when forced to conduct their cases in Athens.[5] Reports of this situation were probably exaggerated, then as now, but there seems to be no question that there is some basis for the charge. One of Antiphon's characters, a native of Mytilene, was subjected to treatment which he would probably not have suffered if he had been an Athenian.[6]

Prejudices less fundamental than those rising from racial differences also figure in our courts. It may not surprise us that a Christian Scientist should, when serving as juror, vote against a surgeon, who was on trial, "because she did not believe in doctors"

[1] *Unpart. Rev.*, XIII, 26, p. 297.
[2] *Antidosis* 160.
[3] *Unpart. Rev.*, XIII, 26, p. 289.
[4] *Ibid.*, p. 290.
[5] Xen. *Polity of the Athenians* i. 14 ff.; iii. 2; Aristophanes *Birds* 638 ff., 1422 ff.
[6] Antiphon v. 16–17.

and thought he ought to pay the damages asked.[1] But it is a little surprising to hear that personal appearance has its effects on the jury. One woman juror is quoted as being extremely regretful that her dread of the other jurors' attitude kept her from giving her vote in favor of the plaintiff as she had wanted to because he was such "a good-looking man." This lady deserves almost as much fame as the two women jurors who agreed audibly in their hatred of the lawyer "with the moustache."[2] It is not recorded that the style of moustache was the cause of the bitter feeling, but it seems fair to assume that it was at least a contributory cause. This reminds us of the Athenian Nicobulus, who insists that the plaintiff's chief charge against him is that "Nicobulus is a 'hateful thing'[3] [as the ladies would say], walks fast, talks loud, and carries a cane," and of Apollodorus, who admitted that his appearance and manner of walking and talking were unfortunate and to his disadvantage.[4] Until recently it had been our conviction that the Athenians were more sensitive than Americans ever could be to such details, but the coming of women into public life has added much of the finer feeling that was hitherto lacking. The lawyer with the moustache might very well plead as did Lysias' interesting and self-confident Mantitheus, that neatness of appearance and style of hairdress should not be considered in the courts.[5] Mantitheus apparently belonged to the group of young Athenians who were accused of copying Spartan ideas and his long hair may have been as good an indication of pro-Spartanism as the *kaiserliche* moustache used to be of pro-Germanism, but in fairness to the lawyer we must note that nothing is said to indicate that his moustache was of that variety.

One of the most serious charges against the courts of Athens is that of inability or reluctance to judge a case on its own merits, without regard for extraneous matters.[6] Athenian custom encouraged the introduction of personalities into the speeches of litigants.

[1] *Unpart. Rev.*, XIII, 26, p. 293.
[2] *Ibid.*, p. 296.
[3] ἐπιφθονος Dem. 37. 52.
[4] Dem. 45. 77.
[5] Lys. 16. 18–19.
[6] Whibley, *op. cit.*, p. 476; *Syc. in Ath.*, pp. 12 ff.

Speakers devoted considerable time to personal vilification of opponents and to eulogies of themselves and their families.[1] References to the patriotic record of the speaker and the "slacker" record of his opponent were especially common and we can now understand better than ever what the effect of such statements would be. Had there been any method of taking a juror to task for alleged unfair decision, it is probable that the oath that the jurors took, guaranteeing a fair trial, would have had more effect. As it was, the jurors were entirely irresponsible. Add to this the fact already alluded to, the lack of any judge, in our sense of the word, to rule on the question of what was relevant, and we have indeed a precarious situation. Not only critics of Athenian democracy but even the orators lament the fact that a case is too often decided by irrelevant matters.[2] In America the juror's task is even more complicated than was the Athenian's. The conclusions of an Athenian court were "bare affirmations or negations, not discriminating between law and fact, applicable only to a particular case, and based on reasons which were known only to the individual voters, and perhaps not always to them."[3] The American juror must not only decide the disputed facts; he must decide them according to the law and the evidence.[4] He must listen carefully to all the testimony and all the speeches of counsel. After that he must retire and sift all the testimony and come to his own conclusions as to the real bearing of what he has heard. This demands a clear comprehension of the points at issue. Only a mind experienced in the courts and trained in the delicate art of detecting what is extraneous can be expected to do this. Our system does, of course, seek to avoid this difficulty by providing that the judge instruct the jurors as to what the law is and what they are expected to consider. But it is the tendency of these instructions to become complicated and lengthy, and even when the juror is anxious to understand them, his mind, lacking technical training, fails to take them all in.[5] Some critics,

[1] *Syc. in Ath.*, pp. 13 ff.
[2] Xen. *Apology* 4; Plato *Apology* 28 A; Antiphon 5. 11; Dem. 20. 166.
[3] Whibley, *op. cit.* (3d ed.), p. 477.
[4] *Unparl. Rev.*, XIII, 26, pp. 290–92, 304, 305; *Public*, XXII, 957; *Am. Law Rev.*, XX, 665 ff.
[5] *Am. Law. Rev.*, XX, 666; *Unpart. Rev.*, XIII, 26, p. 305; *Public* XXII, 958.

in fact, believe that the average juror neither heeds nor understands the instructions.[1] Even when technicalities and complicated arguments are not to blame and when judges give brief and explicit instructions to the jurors as to the matter for their consideration, our American juries are said to confuse the points at issue continually. As a concrete instance we are told of the case in which a man on trial for perjury was in danger of conviction, not because the charge had been proved, but because in the course of the case some transaction was mentioned in which the defendant was, in the opinion of half of the jury, guilty of attempting to defraud a creditor. Only the persistence of one of the jurors (a trained lawyer, by the way), who recognized the confusion of issues, gave the defendant acquittal.[2] Such instances are so common, according to men who have experience in these matters, that writers express themselves as opposed to a system which injects an uneducated and inexperienced body into the judicial system and expects such a body to apply legal principles to facts and in this way furnishes opportunity not only for appeal to the passions and prejudices, but also for introduction of extraneous matter.[3]

Sympathy for a litigant may be inevitable, but it should obviously not affect the decision of the jurors. Under the Athenian system it was practically impossible to prevent this. Personal appeals of all sorts were permitted and encouraged. To bring into the court members of the family to weep and wail and implore the jurors' pity was a custom so entrenched that refusal to do so was considered a defiance flung in the face of the jurors. It was likely to be construed as lack of respect for the majesty of the court.[4] The American jury is also accused of succumbing to the effects of sympathy.[5] Defendant's attorneys are inclined to plead with the jurors for pity for their clients and instances are mentioned in which pity alone will explain the verdict. In support of this point one writer tells the story of the man who brought a suit for damages

[1] *Public*, XXII, 957; *Am. Law Rev.*, XLII, 195.
[2] *Unpart. Rev.*, XIII, 26, p. 289.
[3] *Am. Law Rev.*, XX, 663.
[4] Plato *Apology* 34 C ff.
[5] *Public*, XXII, 958; *Am. Law Rev.*, XX, 677; XLII, 195 ff.

against a traction company. He claimed to have been injured while walking on its right of way and that as a result of this injury he had a broken spine. He appeared in court greatly emaciated and wore a steel collar to support his head. Physicians testified that he could not live six months. Obviously, if he was to receive any verdict at all it should have been a very large one; what he did receive was $3,000.[1] This is explained by the fact that the jurors were not convinced that the accident occurred as the plaintiff claimed, but were sorry for the invalid. In personal-injury cases it has become quite usual for the jurors, when not fully convinced by testimony, to allow their sympathy to dictate the verdict and then to salve their consciences by imposing merely nominal fines.[2]

Sympathy for widows and orphans is especially natural and possibly common. It is not surprising to find that the jurors who felt that the railway company "could afford to pay" were sitting on a case in which the plaintiff was a widow. There seems to have been no serious consideration of whether the company was justly compelled to do so.[3] Sympathy for orphans was proverbial of the Athenian jurors. In the words of the speaker in the case vs. Nausimachus: "They were orphans and young and their characters were unknown, things that with you, as everyone says, have much more force than many great and just deeds."[4]

Bodies whose prejudices and sympathies are so easily aroused are naturally at the mercy of clever and eloquent speakers. Appeals that affect these prejudices and sympathies have more weight than facts. This situation gave the pettifogger (*συκοφάντης*) in Athens an unfortunate advantage.[5] His familiarity with the courts taught him how to work upon his audience, and his lack of scruples supplied him with the courage to do so. One need not be a specialist in Athenian law to recall what an important rôle these pettifoggers played in Athens. The wealthy, the "gentlemen who avoided litigation," prominent statesmen, islanders from every part of the empire, all feared their attacks. It is hardly necessary to go into

[1] *Unpart. Rev.*, XIII, 26, p. 293.
[2] *Ibid.*, p. 294.
[3] *Ibid.*, p. 292.
[4] Dem. 38. 20.
[5] *Syc. in Athens*, pp. 9, 17, *et passim.*

details and this is not the place to do so, but it is an indisputable fact that the character of the popular courts was largely responsible for their success and increase. It may perhaps be surprising to hear that American juries are regarded by many writers as responsible, to a great extent, for the success of our modern sycophant. We are reminded of the "efforts of learned counsel to work upon their prejudices, to enlist their sympathies and to win their verdict." Actual instances are in fact offered of trials in which prosecuting attorneys, in their zeal for securing conviction, succeed in convincing the minds of the jury by their appeals, in spite of the fact that there is entire lack of evidence. Writers urge discontinuance of the jury system because it "encourages pettifoggers and shystering" and "degrades the legal profession by affording greater opportunity for the pettifogging lawyer."[1]

In addition to the above-mentioned disadvantages of our American system, some writers call attention to the waste of time and money incurred in impaneling a jury, and even in the use of a jury at all,[2] and to the undesirable publicity given to private matters with which the public has no concern. One writer goes so far as to brand a system as unethical "that drags private differences before the public and asks a section of the public to retire into the privacy of a jury room and in secret session decide such differences and make up a public record for all time of such differences."[3]

To remedy these evils in our administration of justice some of the critics suggest that cases be tried before judges alone. By virtue of their training, their practical experiences on the bench, their habit of mind, they are better qualified to decide a case on its merits, to ignore appeals to their prejudices and sympathy, to observe illogical and untenable arguments, and to consider the value of testimony and the demeanor of witnesses when on the stand.[4] This solution is remarkably like a method of trial that existed in Athens and which we ignore far too much—trial before

[1] *Public*, XXII, 959; *Am. Law Rev.*, XX, 677; *ibid.*, XLII, 195, 197; *Unpart. Rev.*, XIII, 26, pp. 299, 307.

[2] *Unpart. Rev.*, XIII, 26, pp. 277, 300, 306; *Public*, XXII, 959; *Am. Law Rev.*, XX, 676 f.

[3] *Public*, XXII, 958.

[4] *Am. Law Rev.*, XX, 669, 676; *Unpart. Rev.*, XIII, 26, 301, 305 f.

public arbitrators. Discussion of this will involve a few words about the "court of the Forty."[1] These men were originally circuit judges, who traveled over the demes and gave judgment. Later they apparently sat at Athens. Before them came the bulk of private suits, especially those about property rights. Each case was tried before the four of the Forty who belonged to the defendant's tribe. If the dispute involved sums not over ten drachmae their decisions were final. They were, it is to be noted, both jury and judge. Suits involving sums over ten drachmae they brought before a public arbitrator. Service as public arbitrator was required of all male citizens in their sixtieth year, who spent the last year of their state service in this way. The first duty of the arbitrator was to attempt to bring about a compromise. If this could not be done, he gave his decision, on a fixed day, after due hearing of the arguments and evidence. Appeals from this decision might be made to the regular courts. In the words of Wyse: "The intention was to procure the settlement of private suits by experienced and impartial men, whose first aim was to make peace. . . . . In a large number of suits the constitution did not compel two quiet citizens to face the ordeal of a trial in court, but provided a cheap and simple means of getting justice."[2] The recognized advantages of this are practically those which are now claimed for trial by experienced judges: removal of all forms of personal appeals, avoidance of publicity, elevation of the legal profession, impartiality, speed, and economy.

Undoubtedly many cases that came before arbitrators were appealed to the courts. Even quiet and retiring individuals who felt that the decision of the arbitrator was wrong would face the ordeal of public trial in the interest of their rights, and certainly litigious individuals would do so in the hope of being able to reverse the arbitrator's decision by the form of influence that they knew was successful with the larger and more susceptible body. In America it is, of course, also possible for the parties to waive trial

[1] For fuller statement see Gilbert, *Greek Constitutional Antiquities* (Eng. ed.), p. 377; Whibley, *op. cit.*, p. 473.

[2] Whibley, *op. cit.*, p. 473. This is not the place to discuss the jurisdiction of the Athenian arbitrators. The reader will find a full discussion of that phase of the question, with bibliography, by Bonner, *Classical Philology*, II, 407.

by jury and content themselves with the decision of the judge. This, however, seems to be somewhat unusual and we are told that it is with us, as it was with the Athenian, the man who has a weak case who wants a jury.[1] The reasons are obvious.

This incomplete review of the "case against trial by jury" shows:

1. That juries, both in the Athens of Demosthenes and in the America of today, tend to be composed of individuals who are well satisfied with their fees and importance, but who are, by neither ability nor training, suited to the complicated task before them.

2. That injustice is often due to the susceptibility of these jurors to situations and appeals that affect their sympathy, prejudices, passion, and chauvinistic patriotism, and also to their inability to distinguish between what is and what is not relevant to the matter in hand.

3. That this situation gives encouragement to the unscrupulous *συκοφάντης* or pettifogger.

4. That for civil cases, at least, a system of trial is desirable which offers economy, speed, and impartiality, removes opportunity for appeals to prejudices, discourages shystering, and makes it unnecessary to air private affairs in public.

5. That trial before public arbitrators, in Athens, had in it most of the advantages urged for trial before judges without jury here in America.

[1] *Unpart. Rev.*, XIII, 26, 301.